IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 5/1998

Sujata Sanzgiry,
r/o. E-132, Chincholim,
Taleigao, Ilhas, Goa. ..... Appellant.

V/s.

1. Ankush R. Naik,
r/o. St. Inez, Panaji, Goa, having
his Office Vishal Constructions at
Kamakshi Prasad, Near Patto Bridge,
Panaji, Goa.

2. Shaik Akbar Ali,
r/o. Flat No.201,
Ishkrupa, St. Inez. ..... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. Iftikar Agha, Advocate for the appellant.

Mr. M. S. Sonak, with Mr. D. Pangam, Advocates for the respondent No.2.

CORAM : R.M. LODHA, J.

DATE : 18TH AUGUST, 2005.

ORAL JUDGMENT :

This first appeal is directed against the Judgment and Order (deemed decree) dated 9th October, 1997, passed by the Executing Court on an application under Order 21, Rule 97 of Code of Civil Procedure (`CPC', for short).

2. The appeal arises in the facts and circumstances which may be briefly indicated first :

i. By an Agreement for Sale dated 5th August, 1989, the first respondent agreed to sell the Flat No.201, St. Inez, Panaji, Goa, to the appellant for a consideration stated therein.

ii. The respondent No.1 failed to honour the agreement for sale which necessitated the appellant to file a suit for specific performance and delivery of possession against the respondent No.1 on 13.2.1991.

iii. In the suit filed by the appellant, an application was made for temporary injunction restraining the respondent No.1 from inducting any third party.

iv. The ex-parte temporary injunction was granted by the trial Court on 13.2.1991 which was later on confirmed on 27.8.1991.

v. The dispute raised by the present appellant in the suit for specific performance and delivery of possession was referred to the Arbitrator.

vi. On 27.5.1993, the Arbitrator passed an Award in favour of the appellant directing the respondent No.1 to convey the Flat No.201 in favour of the appellant and deliver possession upon the appellant making payment of Rs.1,70,000/- to the respondent No.1.

vii. The Award passed by the Arbitrator on 27.5.1993 was made Rule of the Court on 3.6.1994.

viii. The Award having been made Rule of the Court and the Decree having been passed in favour of the appellant directing the respondent No.1 to convey Flat No.201 and deliver the possession thereof to the appellant, the appellant levied execution of the decree on 26.9.1994.

ix. In the execution application, respondent No.1 filed objection that he was not in possession. The Executing Court, by Order dated 20.11.1995, dismissed the objection of respondent No.1 and ordered execution of the Decree.

x. The present respondent No.2, on 29.11.1995 made an application under Order 21, Rule 97 CPC claiming to be in possession of the flat in his own right and set up the case thus: that by Agreement for Sale dated 16.10.1990 the respondent No.1 agreed to sell Flat No.201 for a consideration of Rs.2,80,000/- to him; that the applicant (respondent No.2 herein) had already paid a sum of Rs.2,50,000/- to the respondent No.1 after the necessary occupancy certificate was obtained from the Panaji Municipal Council pursuant to the Agreement for Sale; that the applicant had resisted the execution of the decree and refused to hand over possession to the bailiff; that the

applicant was not aware of any suit filed by the Decree-holder (the appellant herein) and the Judgment-debtor (respondent No.1 herein).

xi. The inquiry was held on the application made by the respondent No.2 under Order 21, Rule 97 CPC.

xii. Upon conclusion of the inquiry, the Executing Court allowed the application made by the respondent No.2 vide impugned Order dated 9.10.1997.

3. The appellant who is the Decree-holder, aggrieved by the Executing Court's Judgment and Order, has filed this first appeal.

4. I heard Mr. M. S. Usgaonkar, the learned Senior Counsel for the appellant and Mr. M. S. Sonak, the learned Counsel for the respondent No.2. The respondent No.1 has not chosen to appear despite service.

5. The Executing Court held that the respondent No.2 was a bona fide purchaser for valuable consideration without notice of the previous agreement between the appellant and the respondent No.1 and that the respondent no.2 was put in possession by the respondent no.1 on 18.10.1990 pursuant to the Agreement for Sale dated 16.10.1990.

6. The case of the respondent No.2 in resisting the execution of

the decree passed in favour of the appellant is founded on Section 19(b) of the Specific Relief Act. as is clearly reflected from the averments made in the application under Order 21, Rule 97 CPC.

7. In the light of the submissions made before me, the question that arises is: whether the respondent No.2 is a 'transferee for value' who paid the money in good faith and without notice of the original contract between the appellant and the respondent no.1, within the meaning of Section 19(b) of the Specific Relief Act, 1963.

8. Section 19(b) of the Specific Relief Act , 1963 reads thus :

> " **19. Relief against parties and persons claiming under them by subsequent title.** - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -
> (a) ...
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for a value who has paid his money in good faith and without notice of the original contract ;"

9. Section 19(b) of the Specific Relief Act, 1963 is in same terms as was Section 27(b) of the Specific Relief Act, 1877. The word 'transferee' occurring in Section 27(b) of the Act of 1877, came up for consideration before the Devision Bench of Patna High Court in the

Case of **Loknath Prosad Singh and anr. v. Shah Wahib Hussain and ors.,** A.I.R. 1930 Patna 181. The Division Bench of Patna High Court held thus :

> " I shall first deal with the defence of the defendant 3 because if that is established it is complete answer to the claim. He claims to be a bona fide purchaser for value without notice; and the question is whether he was a transferee within the meaning of S. 27(b) Specific Relief Act, and whether he had paid his money. It is contended on behalf of the plaintiffs that as a transfer of immovable property worth Rs.100 and upwards can only be made by registered instrument, defendant 3 was not a transferee on the date on which he received the notice of the plaintiffs' contract for sale at the registration office. It is contended on behalf of the defence that the word "transferee" in S. 27 is used in a wide sense as meaning a person to whom a conveyance has been made and that registration of the conveyance was not within the contemplation of the legislature.
>
> I cannot assent to this view. Section 27 (b) merely enacts the English equitable rule which allows a later legal title to prevail over an earlier equitable title in the case of a bona fide purchaser for value without notice; but if the title is not complete there is no room for the application of this rule; and in completing title in Indian registration is necessary. When the Specific Relief Act of 1877 came into force on 1st May that year, the Registration Act 3 of 1887, which came into force on

1st April, required the registration of transfers of land of the value of Rs.100 and upwards and enacted in S.49 that:

> "No document required by S. 17 to be registered shall affect any immovable property comprised therein .... unless it has been registered."

Consequently at the date of notice the title of defendant 3 was not complete and he was not a transferee within the meaning of the section. "

10. In the case of **Veeramalai Vanniar (died) and ors. v. Thadikara Vanniar and ors.,** AIR 1968 Madras 383, the Division Bench of Madras High Court dealt with the provisions of Section 27(b) by observing thus :

> " The only question that remains is whether the defendants are entitled to invoke the provisions of Sec.27 (b) of the Specific Relief Act, as persons who have paid money in good faith and without notice of the original contract. It is simply amusing how, on the admitted facts, the learned Subordinate Judge felt that defendants 3 to 5 are transferees for value who have paid their money in good faith and without notice of the plaintiff's agreement of sale. He has not borne in mind the rudiments and the basic principles of law. The general rule is that no person can convey a better title than what he has, except where the statute provides exceptions to the rule like Sec. 27(b) of the Specific Relief Act. If a person, as the owner of the

property, has entered into an agreement to sell the property, he cannot thereafter convey the same property to any other person, as after the prior agreement of sale, he cannot be said to be a free owner of the property. If he subsequently alienates the property he can alienate it only subject to the rights created under the prior agreement of sale. S. 27 of the Specific Relief Act is in these terms : -

"27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(a) either party thereto; (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

The plain language of the sub-section (b) shows that the subsequent transferee can retain the benefit of his transfer by purchase which, prima facie, he had no right to get, only after satisfying the two conditions concurrently; (1) he must have paid the full value for which he purchased the property and (2) he must have paid in good faith and without notice of the prior contract. "

11. The learned Counsel for the respondent No.2 heavily relied upon the Judgment of the learned Single Judge of this Court in the case of **Mahadeo Keshav Lingarkar and another v. Shamrao Balwant Kesarkar,** AIR 1972 Bombay 100. In the said Judgment, the learned

Single Judge held thus :

> "6. In my judgment, the use of the word `title' in Explanation II does not mean that the general principles with regard to constructive notice embodied therein will not be applicable to the notice referred to in the proviso to Section 53-A. From the illustration to Section 27(b) of the Specific Relief Act, 1877 referred to above and from the above decision of the Calcutta High Court, it is clear that the word `title' as used in the Explanation II means not only a completed title in accordance with law but also includes an equitable interest which a transferee may acquire in any property by virtue of, and under the contract of transfer. A subsequent purchaser of an immovable property would be affected with notice of the interest of a tenant who is in possession of the property in part performance of an unregistered agreement with the lessor and consequently with notice of such agreement and would not succeed in defeating the tenant's claim to retain possession under the protection given to him by Section 53-A of the Act. Reference in this connection may be mad to Ramkrishna V. Mahadei, AIR 1965 Pat. 467.
>
> 8. As stated by Sir Lawrence Jenkins in Baburam v. Madhab Chandra, (1913) ILR 40 Cal. 565. "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no inquiry of the tenant, he cannot claim to be a

transferee without notice." In view of these principles, it was the duty of the plaintiff to make an enquiry with the defendants as to what their rights were. As the plaintiff admittedly failed to make any enquiry in respect of the rights of the defendants in the said house, it must be held that he had notice of the contract or part performance thereof and hence, in my opinion, the learned District Judge erred in law in holding that the proviso to Section 53-A was attracted in this case. In the facts and circumstances of the case, it cannot be said that the plaintiff was a transferee for consideration, who had no notice of the contract or of the part performance thereof within the meaning of that proviso, because the defendants were in possession of the house and it was incumbent on the plaintiff to make proper enquiry into their rights before getting a sale of the half share in the property in his favour.

9. For these reasons, the defendants must succeed because under Section 53-A, defendant No.1 having contracted with Tatoba and Haval to purchase the property, must be continued in possession of the suit house in part performance of the contract; and defendant No.1 being ready and willing to perform his part of the contract, neither Tatoba nor Haval or the plaintiff, who claims under Tatoba, can deprive the defendants of the possession of the suit house."

12. In the case of **Babu Lal v. M/s. Hazari Lal Kishori Lal and ors.,** AIR 1982 SC 828, the Supreme Court reiterated the legal position that the contract for sale does not give any right or title.

13. The Gauhati High Court in the case of **Abdul Mazid v.Burhanuddin Ahmed and ors.,** AIR 1980 Gauhati 44 upon which reliance was placed by the learned counsel for the respondent no.2, held in paragraph 25 of the report that part performance creates a defensive equity in favour of the transferee in respect of the property transferred and he can use it as a shield against any attempt on the part of the transferor or anybody claiming through or under him to enforce his right against it. He cannot stricto sensu be said to be a holder of title. In paragraph 29 of the report, the Gauhati High Court observed that though the right under Section 53-A is a passive one, it is sufficient to be noticed under Explanation II to Section 3 of the Transfer of Property Act that the transferee being in possession, part performance may also be an additional justification for specific performance of the contract and may come under notice envisaged in Section 19 (b) of the Specific Relief Act. Then in paragraph 43 it was stated that the concept of notice as envisaged in Section 3, Explanation II, Transfer of Property Act, shall have to be applied in determining the same under Section 19(b) of the Specific Relief Act.

14. The Supreme Court in the case of ***Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan and Anr., (1990) 3 SCC 291*** held that the agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is entitled to

attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Though Section 64 CPC was intended to protect the attaching creditors, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligations arising therefrom must be allowed to prevail over the right of the attaching creditor.

15. The view taken by the Patna and Madras High Courts with regard to the expression `transferee' occurring in clause (b) of Section 27 of the Specific Relief Act, 1877 is relevant and applicable to the construction of Section 19(b) of the Specific Relief Act, 1963. The expression `transferee' in Section 19(b) cannot be given wider meaning than it contemplates, i.e. a person to whom the conveyance has been made. A person in whose favour a conveyance or the document of title has not been executed would not be covered by the expression `transferee' within the meaning of clause (b) of Section 19. The reason is not far to seek. An agreement for sale by itself does not create any right or title. Section 19 deals with the cases where specific performance of the contract may be enforced against the parties enumerated therein. Inter alia, the specific performance of the contract can be enforced against either party to the contract or any other person claiming under them or a person claiming title arising subsequent to the original

contract. The exception to this general rule is that later legal title shall prevail over an earlier equitable title in the case of a bona fide purchaser with valuable consideration without notice of earlier contract. The expression `title' used in clause (b) is referable to the complete legal title. An agreement for sale subsequent to the original contract shall be out of purview of the expression `title' in Section 19(b). Though the learned counsel for the respondent no.2 argued that the word `title' in Section 19 (b) should be given the same meaning as is reflected from the word `title' occurring in Explanation II to Section 3 of the Transfer of Property Act and for that purpose the Judgment of this Court in the case of **Mahadeo Keshav Lingarkar and anr**. (supra) was relied upon, but I am afraid the said argument cannot be accepted. That was a case relating to Section 53-A of the Transfer of Property Act. The construction of the word `title' occurring in Explanation II to Section 3 cannot be imported to the construction of the expressions `title' and `transferee' occurring in clause (b) of Section 19 of the Specific Relief Act. The context in which the word `title' has been used in Section 19(b) is entirely different from the context in which the word `title' has been used in Explanation II to Section 3 of the Transfer of Property Act. In my considered view, the exception carved out in Section 19(b) has to be strictly construed and the word `transferee' being part of exception clause has to be construed strictly and cannot be given wider meaning. For the purposes of Section 19(b) the word `title' means completed title and the word `transferee' means the purchaser

who has acquired complete title in accordance with law and not the contractee.

16. As regards the Division Bench Judgment of the Gauhati High Court, suffice it to indicate that the defendants No.2 and 3 were claiming to be the bona fide purchasers of the property for value without notice not based on an agreement for sale, but rather the completed sale as the conveyance deed had been executed by the defendant No.1 in favour of the defendants No.2 and 3. The Judgment of the Gauhati High Court, for the reasons stated in para 42 is also not of much help to the issue involved in the case in hand.

17. The learned Counsel for the respondent No.2 sought to urge that the respondent No. 2 has been put in possession of the flat pursuant to the contract for sale dated 16.10.1990 by the respondent No.1 and by virtue of Section 53-A of the Transfer of Property Act, he is entitled to the protection of his possession. The contention is only noted to be rejected. The appellant is a decree-holder in whose favour the decree for specific performance of the contract in respect of the said flat has been passed against respondent No.1. He has levied execution of the said decree. Respondent No.2 can successfully resist the execution of the decree only if he is able to establish his independent title over the property. Respondent No. 2 has not acquired any title nor is he a transferee within

the meaning of clause (b) of Section 19. He cannot resist the decree passed in favour of the appellant on the ground that he was put in possession by respondent No.1 under the Agreement for Sale dated 16.10.1990. As a matter of fact, the agreement dated 16.10.1990 in favour of the respondent no.2 is of no legal value as it is subsequent to the contract that respondent No.1 had entered into with the appellant and in respect of which a decree for specific performance has been passed in favour of the appellant.

18. One more aspect needs to be noticed before I conclude. The purchase contemplated under clause (b) of Section 19 must satisfy four conditions: (1) that the transfer is for value; (2) that the payment of full value has been made; (3) that the purchase was done in good faith; and (4) that the purchase, including payment of money was without the notice of the original contract. The agreement dated 16.10.1990 under which the respondent No.2 claims to have purchased the said property shows that the respondent No.1 agreed to sell the said property to the respondent No.2 for a consideration of Rs.2,80,000/- . Clause (e) of the agreement provides that the purchaser (respondent No.2), in terms of the agreement paid to the vendor (respondent No.1) a sum of Rs. 1,80,000/- as earnest money and agreed to pay the balance price money as laid down in the agreement. Thus full value of the purchase, on the face of the agreement, cannot be said to have been paid by respondent No.2 to

respondent No.1. In the application under Order 21 Rule 97 CPC the respondent No.2 averred that he paid Rs.2,50,000/- only. Thus, on the basis of the case set up by the respondent No.2, it is clear that he had not paid the full purchase price to the respondent No.1. The condition of payment of full value of the property is also not satisfied by the respondent No.2.

19. The respondent no.2 cannot be held to be `transferee'. He is only subsequent contractee. He has also not paid full value. He is not covered by the exception carved out in Section 19(b).

20. In the light of the aforesaid discussion, the factual aspects about notice are not required to be gone into.

21. The appeal is allowed. The impugned Judgment and Order dated 9.10.1997 is set aside. The application under Order 21, Rule 97 CPC filed by the respondent No.2 is dismissed. The parties shall bear their own costs.

R.M. LODHA, J.

ssm.